

USDOL/OALJ Reporter

[\*Drew v. Jersey Central Power & Light Co.\*](#), 81-ERA-3 (ALJ June 16, 1982)

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**U.S. Department of Labor**  
Office of Administrative Law Judges  
John W. McCormack Post Office and Courthouse  
Room 409  
Boston, Massachusetts 02109

Case No. 81-ERA-3  
Energy Reorganization Act of 1974

In the Matter of:

CAMERON DREW  
Complainant

v.

JERSEY CENTRAL POWER  
AND LIGHT COMPANY  
Respondent

Appearances:

Ray J. Barson  
For Complainant

Charles F. Waskevich, Jr.  
For Respondent

Before: ROBERT M. GLENNON  
Administrative Law Judge

DECISION AND ORDER

This is a so-called "whistle-blower" complaint filed in accordance with a special employee-protection provision of the Energy Reorganization Act of 1974 (42 U.S.C. § 5851), and the

regulations issued by the Secretary of Labor, at 29 C.F.R. § 24 (1980), implementing the employee protection provisions of the statute. By that complaint Cameron Drew, of Yardville, NJ, has alleged that the Jersey Central Power and Light Company, of Morristown, New Jersey, discharged him from its employment in retaliation for activities protected by the statute. Jersey Central, a subsidiary of the General Public Utilities System, is engaged in the business of generating electrical power at a number of power stations in New Jersey, including a plant at Oyster Creek, a nuclear power plant.

In substance Mr. Drew contends that he was discharged because he raised questions about the safety of Jersey Central's procedures and activities at the Oyster Creek nuclear power plant and because he cooperated with the staff of the Nuclear Regulatory Commission in reporting those problems.

In substance, Respondent, Jersey Central, contends that it discharged Drew for legitimate business reasons. In its own words, Respondent "categorically denies that any alleged assistance Complainant may have given the Nuclear Regulatory Commission in any way resulted in the termination of his employment."

A regional office of the U.S. Department of Labor conducted an informal investigation of the complaint, as provided for in the governing regulations, 29 C.F.R. § 24.5, and issued its finding in a letter dated November 5, 1980. That letter advised the parties of its conclusion:

. . . That Cameron Drew was a protected employee engaging in a protected activity within the ambit of the Energy Reorganization Act of 1974, and that discrimination as defined and prohibited by the Statute was a factor in the actions which comprise his complaint. . . .

The DOL letter, accordingly, directed the reinstatement of Mr. Drew and payment of compensatory damages. In accordance with the DOL regulations, 29 C.F.R. 24.4 (D)(3), the Respondent requested a hearing before the Office of Administrative Law Judges. The procedures governing the hearing are detailed at 29 C.F.R. 24.5.

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The matter has been subject of a public hearing at Treton, N.J., with hearing sessions taking place on December 2, 1980 and February 18, April 14, and October 14, 1981. Post-hearing briefs were filed by the parties on March 4, 1982.

*1. The General Factual Background.* The document which initiated this proceeding, a 6-page memorandum by which Drew stated his complaint to the U.S. Department of Labor on September 30, 1980, presents his detailed version of the Events and Circumstances which caused his firing. In Drew's version, two "whistle-blowing" contacts with officials of the Nuclear Regulatory Commission, occurring nearly a year apart, were the crucial and causal events.

The first of these two contacts between Drew and the NRC inspectors took place in November 1978 at a time when Jersey Central was working to conclude a scheduled "outage" at the Oyster Creek nuclear plant. Drew's testimony is that a welder approached him and questioned the quality of a four-inch stainless steel valve intended to be welded into the water quality system. Drew stated:

. . . he informed me that one side of the valve had a welded flange which had been welded by the contractor who supplied the valve and since the weld was defective he refused to weld the other side because he might be held responsible for the flange weld also. After inspecting the valve in question, I concurred it was faulty and went to the QA Department on-site.

The "QA Department" referred to was Jersey Central's own Quality Assurance Department, the staff responsible for ensuring compliance with safety procedures mandated by federal law, among other things.

Drew had two concerns, and expressed them to the QA supervisor at the Oyster Creek plant. First, he believed that the manufacturer of the valve was not on the QA Department's approved list of suppliers, and secondly, in any event, that there was an apparent defect in a weld on the valve itself.

The QA supervisor conceded only that the weld did not look right, "cosmetically," but declined to intervene to prevent its installation as Drew proposed. Instead, Drew was told he could file a non-conformance report (NCR) to report his concerns formally within the company. In addition, the engineering department staff suggested that Drew conduct a hydro-testing of the valve, at twice

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the working pressure, in order to allay his concerns about the safety of the valve. Drew refused to perform such a test since he believed it would not satisfy the governing safety regulations.

Drew did fill out a company non-conformance report (NCR), and took it to William Popow, the Jersey Central official directing the "outage" process, for his signature. Drew's testimony is that Mr. Popow reacted as follows:

. . . After reading and hearing my explanations, he ordered me to tear up the report, I refused and he again repeated that it was "none of my damn business and tear up that report." I stubbornly refused and left his office. . . .

Then, Drew testified:

I went to the NRC office and reported to Mr. Ernest Journigan an NRC inspector just what had happened. He looked at the valve and went to another NRC

inspector who was more knowledgeable in welding and he in turn went directly to the assistant superintendent of the Company and within a few minutes I was called by the assistant superintendent and ordered to "fix the valve the way you want it fixed." The valve was repaired and installed within 24 hours after one week of trying to deal with Mr. Popow.

The NCR report which Drew filled out itself became the focal point in the second of Drew's alleged whistle-blower sessions with the NRC staff. Drew retained the original copy of the NCR form and took it home. Then, in the Fall of 1979, during an essentially routine audit of Jersey Central's compliance records, the NRC staff discovered that the NCR report registered by Drew had not been "closed" in accordance with governing QA procedures. Drew, among others, was called by the NRC auditors to explain his part in this filing or processing of the NCR, and he discussed the entire matter with them again, on October 3, 1979.

On August 17, 1979, shortly before this second contact with the NRC, after a meeting with his supervisor and other Company officials in which his attitude and performance were discussed, Drew was placed in a probationary status. Two weeks later Drew was shown his annual written performance evaluation, which showed a

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significantly lower rating than he had ever before received in his 5 years in the Company. On September 4, 1980, he was advised that he had not performed adequately during probation, and that he was discharged from employment.

In broad outline, Jersey Central's version of its dealings with Drew is that his general performance and behavior had so deteriorated by mid-1980 that the decision to terminate his employment was a reasonable and proper business decision. John Skorka was the man who directly supervised Drew for most of his time as an employee of Jersey Central. Mr. Skorka hired Cameron Drew in January 1975 to be a "welding supervisor." Drew's first assignment was to establish a program for training and testing welders in accordance with applicable governmental and insurance regulations. Skorka recalls that Drew performed very satisfactorily in handling that first general assignment in his first two years or so in the Company, but that Drew's performance declined thereafter. Drew increasingly had difficulty dealing with people in other departments of the Company, according to Skorka. He tried to assert more personal authority, in a variety of situations, than was contained in his job assignment. He showed a difficult personality. He was a highly individualistic worker resistant to authority.

*2. The Contentions of the Parties.* In his post-hearing brief, the Complainant summarizes the facts of record and urges his position that the Company (a) treated Cameron Drew differently from other employees, (b) placed him on probation, and (c) terminated him, all as a result of his cooperation with the NRC, a cooperation which prevented his being "a member of the Family." He contends that the various reasons

advanced by Respondent in this proceeding are merely pretextual for unlawfully discriminatory actions.

In its post hearing brief, Respondent contends (1) that the U.S. Department of Labor lacks jurisdiction to entertain this complaint, arguing that the actions of Cameron Drew in this matter constituted a deliberate violation of law within the meaning of subsection (g) of the "whistle-blower" statute (42 U.S.C. § 5851(g)), which denies protection to any employee who deliberately causes such a violation; (2) that Complainant has failed to state a claim authorized under the statute, but merely unsubstantiated allegations showing his disagreement with the Company's actions here; and (3) that Complainant has failed to satisfy his burden, under *Texas Department of Community Affairs v. Burdine*, - - - U.S. - - -, 101 S.Ct. 1089 (1981), of proving by a preponderance of the

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evidence that he was improperly discharged for an impermissible reason. In general terms, the Company contends that its suspension and firing of Cameron Drew were not motivated in any degree as a retaliatory matter, and that, in fact, Drew simply was not performing his job at an acceptable level.

3. *The Applicable Regulatory Law.* The question presented by the Complaint is whether Cameron Drew was discharged as a consequence of his having engaged in a protected activity. The governing statutory protection, 42 U.S.C. § 5851 (a), provides as follows:

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges or employment because the employee (or any person acting pursuant to a request of the employee)

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding . . . for the administration or enforcement of any requirement imposed. . .

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

Subsection (g) of 42 U.S.C. 5851 provides as follows:

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent),

deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended.

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*4. Certain Evidentiary Matters.* In response to a subpoena authorized by me, the Respondent made available to Complainant, approximately two weeks prior to the last trial session, records purported to be the Company's personnel records of Cameron Drew. Complainant's counsel did make use of the documents in that file in the course of his examination of witnesses in that last trial session, and it was agreed, at the conclusion of the trial, that Respondent would provide copies of all those documents for inclusion in the evidentiary record as a late-filed exhibit.

Respondent did thereafter furnish copies of those documents for the formal evidentiary record. Complainant interposed no objection to any of the documents, and I am receiving them into evidence, collectively, as "late-filed exhibit-personnel records." The principal documents included are itemized below.

<u>Date</u>	<u>Author</u>	<u>Addressee</u>
08-10-79	Cameron Drew	W. Popow
08-10-79	"	G. Kelcec
08-21-79	"	G. Kelcec
09-12-79	"	J. Skorka
11-21-79	"	G. Kelcec
12-07-79	"	G. Kelcec
08-24-79	George Kelcec	C. Drew
11-29-79	"	C. Drew
09-20-79	W. Popow	C. Drew
11-16-79	"	C. Drew
12-21-79	"	C. Drew
06-27-80	S. Saha	S. Singleton
02-05-80	Carol Tokar	J. Skorka
09-04-80	Wayne K. Greenleaf	File
10-29-80	L.E. Briggs	U.S. DOL

In addition to these documents the exhibit contains a variety of essentially routine personnel records reflecting no particular significance for the matters in issue in this proceeding.

At the hearing Respondent introduced, as a part of Exhibit No. 8, a copy of the same letter identified in the listing above as the document dated 10-28-80 authorized by L.E. Briggs, addressed to the U.S. Department of Labor. On objection by Complainant, Exhibit No. 8 was received in evidence only for a limited procedural purpose, related to the issuance of certain subpoenas duces tecum.

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It was otherwise ruled in essence that statements contained in the attached documents offered by Respondent to prove the accuracy of the matters there asserted were inadmissible hearsay. Neither the purported author of the document, Mr. Briggs, nor its recipient, Mr. S. Friedman, was offered as a witness in this proceeding. Respondent did not articulate at the hearing any particular exception to the general hearsay rule which would argue cogently for admission. On posthearing brief, Respondent argues in essence that there are sufficient circumstantial indicia to guarantee trustworthiness of that document to justify its receipt in evidence in this case. On review of this matter I am inclined to agree with Respondent. Accordingly, Exhibit No 8 is received into evidence. The central assertion of fact therein for which Respondent argues admission--that NRC inspector Briggs discovered the defective valve weld in November 1978 independently of Drew's report of that defect to NRC inspector Jernigan--is corroborated by other evidence of record, the uncontradicted testimony of Mr. Fuller, which I do credit in this respect.

*5. Complainant's Performance as an Employee.* Drew was hired in January 1975 at a time when Jersey Central was reorganizing its corporate structure. As particularly pertinent here, three new departments had recently been organized, the Engineering Department, the Quality Assurance Department, and the Maintenance Department. John Skorka, then a supervisor in the new Maintenance Department, interviewed a number of applicants and selected Drew to be the "welding supervisor" in the Maintenance Department. A substantial number of new employees were to be hired as a result of the reorganization, including twelve or so welders. Drew's first general assignment was to establish an in-house program or procedure for instructing and testing the Company's welders, a function previously performed by outside contractors or insurance carriers. Drew's job was essentially "advisory" in nature, rather than "operational," in the sense that he was expected to write welding procedures and give advice rather than perform welding or supervise a staff of employees. At particular times, however, he was expected to perform or supervise special welding assignments.

Skorka testified that Drew "did a commendable job" for the first two years or so. Skorka testified:

I was very well pleased. I hired him for a purpose and I think that there was enough work for him at that particular time to focus his energies in this line of work and he did produce what we wanted him to produce.

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The original expectation was that, for organizational purposes, Drew would report to a mechanical engineer, who in turn would report to Skorka. Because of budget and staffing limitations, however, that engineer position was not filled until January 1979. Skorka, accordingly, was Drew's direct supervisor from January 1975 until January 1979.

It is Skorka's testimony that after Drew essentially completed his first general assignment, that is, after the first two years or so, he increasingly became a "problem" employee. Drew's personality was such that he would seek and assert more responsibility



than other people, supervisors or associates, would want him to have. In 1977, Skorka's own supervisor directed that a welding manual be prepared for the Company with the intent to place copies in the various power stations as a reference manual for the field employees. The manual would give guidance to the on-station welders to cover routine welding situations and problems, thus avoiding repeated referrals to the headquarters staff for guidance in all situations. Drew was given responsibility to prepare the manual and he did so. But then, in 1977, within a few months of issuance, Drew recalled the manuals from the field stations. Skorka believes Drew merely wanted to retain power or authority in himself at headquarters, and simply recalled the manuals "under the pretense that he had some changes to make in the numbering system."

Despite advice from Skorka and his superiors that they really wanted the manual returned for use in the field generating stations, Drew held off on the redistribution of the manual until 1979 when a new person, Guy Cheruvenko, was hired [in January 1979] to be the mechanical engineer in the Maintenance Department and Drew's immediate supervisor. In June or July 1979, the manual was again distributed to the various generating stations. Asked why Drew had deferred the redistribution of the manuals Skorka testified:

Yes, we had many discussions and it was the philosophy with Mr. Drew that this manual did not belong in the stations, that the people were not qualified or could not use it and he was the only one qualified to give any type of direction as far as welding and therefore he just didn't want that manual in his stations.

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In late 1976, Drew was instructed to write a program to qualify the Company for issuance of an "R-Stamp," which would be an authorization by New Jersey to allow the Company to perform its own welding repairs on boilers or other pressure vessels, using its own employee staff. The Company intended this program, initially at least, to cover only its work in its fossil fuel power generating stations, not its nuclear plant. Drew was asked to work on the "R-Stamp" program because the QA Department, which normally would have been given that specific assignment, was then deeply involved in other work for the nuclear power station at Oyster Creek. The "R-Stamp" was a new regulatory development, and the fossil fuel generating manager was anxious to qualify the Company under that new program. Skorka's staff, the Maintenance Department, accordingly was asked to take on this special assignment, to avoid waiting for the QA department to get to this particular problem.

Drew did draft an "R-Stamp" program, within two or three months, but neither Skorka nor his own superior accepted some central elements in Drew's plan. Drew's plan centered responsibility to his own staff position. Skorka's supervisor showed Drew's draft plan to the manager of QA Department and to the vice-president in charge of power generation, and they, in effect, took the project out of Drew's hands. The QA Department initially handled pertinent repair problems on an *ad hoc* basis, and then, in 1978, the QA Department developed and established its own R-Stamp program.



Drew's version of the R-Stamp situation differs in a number of respects from the summary given here. Where the differences occur, however, I have credited the testimony of Mr. Skorka as a fully credible witness in this matter and as the person in a better position to know the material details in issue.

Also in 1977, Drew was assigned to draft revisions of the so-called "7000-Series," a series of quality assurance welding procedures governing certain administrative functions and welding requirements applicable to weldings performed by the Maintenance Department. After a period of time, Skorka was not satisfied with Drew's progress, and a committee was formed to take over the work. The committee consisted of Drew himself, and a representative for each of the Quality Assurance and Engineering Departments. This

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committee did not make much progress either, and Skorka then assigned two engineers to draft the revisions. Thereafter, until completion of the project in 1979, Drew was relegated to a secondary role, giving advice rather than leading the project. The work on this project was completed in mid-1979, after Skorka's own comparatively new supervisor, William Popow, became involved in the matter, and pushed for its completion.

In general, Skorka testified that Drew would not work harmoniously with other staff, in the QA and Engineering Departments, particularly. To Skorka, Drew projected an attitude that only he, Drew, was the expert on welding, and that those who disagreed with him were not qualified to decide matters in issue and that he should be given more authority in such matters.

Skorka testified:

I've addressed it to him time and time again because we've had conflicts with both Engineering and QA feeling that he was imposing on them, trying to get them to accept his view points, not trying to compromise. There were many times when I had some good ideas and those were acceptable, but if they were not, they were not accepted. But to Mr. Drew, it was felt that you have not right not to accept anything that I [Drew] tell you people.

Skorka had a role in the events which led to Drew's probation in August 1979. In late July, Popow, Skorka's immediate supervisor, asked him to prepare a report on his experiences and observations concerning Drew. Drew's status came to a head at, this time, Skorka testified, when Drew's immediate supervisor between January and July, Guy Cheruvenko, left the Company and, in that process, stated strong criticism of Drew's attitude as an employee. Skorka testified:

The reason this thing came to a head, mainly because we introduced another supervisor into the chain, who was Mr. Cheruvenko, and there were a considerable amount of problems there. And when Mr. Cheruvenko left he let it be known that there was subordination [sic] involved and that something should be done about this particular individual.

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That's when the ball started rolling, that it could no longer go on the way it was.

On August 2, Skorka gave Popow his report on Drew. The report did not recommend Drew's probation, but on August 17 Popow and Skorka did meet with Drew and placed him on a probationary status. On August 22 Skorka completed his annual performance evaluation of Drew giving him an overall rating low enough, in practical effect, to indicate unsatisfactory performance. Although Cheruvenko had been Drew's immediate supervisor in the half-year or so prior to August 1979, Skorka had been working at the same field office site as Drew from May 1979 on, and had observed his performance directly there.

Prior to the time Cameron Drew was placed on probation he had received highly favorable annual written employee performance evaluations. A form checklist was used by the Company in performing that evaluation, itemizing 17 particular categories of analysis, such as "working relationship," "productivity," "job knowledge," etc., and an 18th category for an "overall evaluation." Each category is marked on a scale of 1 to 9, with 9 representing "Distinguished," 7 and 8 as "Commendable"; 2 and 3 as "Fair;" and 1 as "Marginal."

In July 1975, Drew received an overall evaluation of 6, the highest score in the "competent" range, with his particular category marks ranging between 5 and 7. In each of the three succeeding years, the last of them given in September 1978, his overall evaluation was a 7, or "Commendable." No category was marked lower than a 6 in 1976 or 1977, and only one category, "working relationship," received a 5 in 1978.

In the September 1979 annual evaluation, the one prepared by Skorka on August 22, Drew received an overall evaluation of 3, the higher of the two "fair" range of values shown. The Company's Director of Personnel stated that a rating in the 3 or 4 range is "low," "showing that there is a problem." In particular categories, Drew was given two 6 ratings, two 5 ratings, three 4 ratings, seven 3 ratings, and two 2 ratings. The two lowest ratings were for "working relationship" and "analytical ability." Drew was given a 3 for "productivity" and a 5 for "job knowledge."

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Each of the annual evaluations was performed by John Skorka, and reviewed by one or more of Skorka's supervisors. The reviewer for the September 1979 evaluation was William Popow.

Skorka testified that he had been pleased with Drew's performance in the first two years and that those first two annual ratings reflected his true opinion. For the latter two years, however, Skorka said he gave Drew the high ratings to ensure his annual pay increases, and thus give him incentive to get his performance back to what he had shown he could offer. Skorka testified:

Your rating was that I was very pleased with you initially and they were good ratings.

Later on, you still received good ratings with my counselling, telling you that you have certain difficulties and that they should be corrected. And Mr. Kelcec also sat down with you to talk these things over.

When he gave Drew the 1978 rating, dropping him from a 6 to a 5 in working relationship and from a 7 to a 6 in productivity, he did explain to Drew that he was "having problems along this way." Skorka said that, despite the high ratings, Drew should not have assumed he was "doing a good job," because he was then being appraised of his shortcomings.

Skorka and Drew had an informal, "very good relationship" for the first two years, because, he testified:

. . . your attitude seemed to have been changed considerably and you wouldn't be treated as a member of the family.

In other words, it seemed to, me that I had to get the point across that I'm serious that this is not acceptable.

. . . I got more formal with you after a certain portion of time because it seemed to me that I could not just operate the way I did, very informally, because I think I was being used to a certain extent and I had all sorts of problems coming in from other people and I was not very happy about the situation because you really were my man and you were not living up to my expectations.

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Although William Popow did not appear as a witness in the hearing, it is clear that there was a special, adversarial aspect to relations between he and Cameron Drew. Popow had been hired by Jersey Central in March 1978 to take over a newly created position. The new position mirrored his prior job for the General Electric Company which previously had contracted to do all the outage planning, and the maintenance and construction during the outages for Jersey Central at the Oyster Creek nuclear power station. In 1978, Jersey Central began to do this work in-house, rather than contracting with General Electric for it. It became Popow's job to manage the same outage Functions at Oyster Creek for Jersey Central as he had managed for General Electric as its contractor.

Drew's written complaint describes their continuing conflict as follows:

The next phase of my career with the company involved unavoidable "clashes" with a Mr. Bill Popow who at that time was employed by General Electric Company as a field service engineer. General Electric was under contract for Oyster Creek's scheduled and emergency shutdowns. Since it was my responsibility to review the welding procedures Mr. Popow used, we frequently came into conflict because he was trying to get the job done as cheaply as he could For G.E., and I was trying to get the *best* and *safest* job done, where welding was concerned, for JCP&L. Two years ago Mr. Popow was hired by the assistant vice-president as our department director and it was the beginning of the end of my career with JCP&L. I felt it was retaliatory.

The first shut-down after his joining the company almost one and one-half years ago at Oyster Creek, we had a very real problem of communication. it was quite evident and can easily be proven in company correspondence that Mr. Popow was not about to cooperate with or even tolerate me. We consistently disagreed over code requirements and interpretations, welding quality, QA involvement, and Engineering involvement. On one project in

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particular, the control rod drive water quality valve which was a nuclear safety related system at the Oyster Creek plant caused me to take drastic action.

The "drastic action" referred to was Drew's reporting the defective valve to an NRC inspector during the November 1978 outage.

Mr. S.K. Saha joined the Company on November 19, 1979, as the senior welding engineer in the Maintenance Department, filling the position held by Guy Cheruvenko between January and June of 1979. Mr. Saha became Drew's immediate supervisor in this position. Saha retained this position until February 1981 when he was transferred to a position with a holding company affiliate of Jersey Central, the General Public Utilities Nuclear Corporation at Reading, Pennsylvania.

When Saha joined the Company he was informed of Drew's probationary status, but said he tried to take a fresh look at Drew's performance as an employee. Shortly after Saha joined the Company it began another scheduled, but extended, outage at the Oyster Creek nuclear station, from January to mid-July 1980.

Saha characterized his observations of Cameron Drew as marking three phases. The first phase was the first two months of Saha's employment, the time just prior to a January-July outage at Oyster Creek. In his preparation for the outage, Saha reviewed the existing welding procedures and the qualifications of the welders and found "many" violations of regulatory requirements. In fact, he stated, some of the welding procedures were in disarray, and in violation of the governing regulatory codes. Saha proceeded to "requalify" those procedures and also the welders who would be using them. Saha testified:

Previous to my coming, Mr. Drew was responsible for qualification of all of the welding procedures. And he should have known that some of these welding procedures, they did not meet construction codes requirements.

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Proper welding technique involves a two-factor testing process for qualification. First, the precise procedures and materials that must be used to provide a satisfactory weld must be identified and approved in advance. Secondly, the welders who will perform the particular welding work must demonstrate that they are qualified to do so.

The second "phase" of Saha's dealings with Drew took place in the early months of the 1980 outage. In mid-February, Saha assigned Drew to assist at Oyster Creek in supervising or helping out welders in certain "problem," or more difficult, welding situations. On one occasion then, when Drew was assigned by Saha to help out a job supervisor on a particular welding job, Saha learned from the job supervisor that Drew had unilaterally changed the pertinent welding procedure. Saha testified:

And I had issued technical instructions to repair that. And, two days later, two or three days later, I had assigned Mr. Drew the second shift operation, but two or three days later, the job supervisor, he called me and he said on one of these instructions, welding procedure instructions, Mr. Drew had changed the diameter of the welding rod. If that was acceptable to me. I said no because that is a technical violation of the instruction code, and he said that he had crossed it out and he had signed his name to it This is one of the examples.

A few days later another incident took place in which Saha learned that Drew was instructing a welder to follow a procedure different from that directed by Saha. Since the particular welding problem was one which had given difficulties in prior outages, and had been the subject of special training attention prior to this outage, Saha believed that Drew's contrary instructions to the welder were given knowingly by him.

The third stage of Saha's dealings with Drew involved his general observations of Drew on a day-to-day basis in the succeeding months until August 1980, when he was asked for a recommendation and report on Cameron Drew's general performance. At the end of August Saha met with the management and personnel group to discuss and consider Drew's status at the end of his one-year probationary period. In June, Saha had prepared a detailed report of Drew's performance for the prior six-month period. That report

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pointed out some problems or continuing difficulties in supervising Drew, but generally was hopeful of change. Saha wrote:

To summarize Mr. Drew's performance evaluation, I can see a slow change towards the better. This applies to his performance, attitude and dealing with others. However, his work must be closely supervised and scrutinized. At this stage there is no way for me to predict whether or not a "slow change towards the better in him" will have a lasting effect.

At the end of August in 1980 at a meeting on Drew's probationary status, Saha recommended his termination. Saha said he found more problems with Drew's work in July and August 1980. He testified:

. . . During the months of July and August, I uncovered some more material, welding procedures which were old welding procedures, which were not adequately tested, full of mistakes and errors, that were developed by Mr. Drew and were used at various power stations of the Company.

Saha also testified:

. . . I felt, as a matter of fact even to the final weeks, he maintained the concept that the construction codes are for guidance only, at least. that is what he kept telling me, and I didn't see - - I was not convinced that he would follow them in the future. I was not convinced about it.

The Director of Personnel and Labor Relations for Jersey Central, John J. Westervelt, became involved in the question of Drew's status in the Summer of 1980 when he became aware that there would probably be a recommendation to terminate Drew's employment at the end of his probation. Because the one-year probationary status had been an unusually long one, and because Drew was a comparatively long-term employee, Westervelt personally reviewed Drew's personnel file. He then became aware that Drew had had highly favorable performance evaluations prior to his probation, and for a long period of time. Westervelt then arranged a meeting in August 1980, with Saha, Skorka, Popow and several other

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management staff people to review the situation. He recalls being most impressed by Saha's comments and recommendation. He did not learn of Drew's dealings with the NRC until several weeks after the firing, when Drew himself raised that concern.

At Drew's request after the firing, Westervelt arranged a meeting for Drew with Mr. Finfrock, a Company vice-president, and Westervelt himself. Drew at the meeting negotiated for a reinstatement elsewhere in the holding company structure. Drew was told that he would be allowed to interview at the other companies within the corporate structure, but that these companies would be told the circumstances of his termination at Jersey Central. At the close of the meeting, Drew advised Westervelt that he felt that he

had been discriminated against for talking with the NRC, that that discrimination was the cause of his firing, and that he might seek to appeal his firing in the legal system.

Steven H. Fuller, the QA supervisor at Oyster Creek, testified at the hearing in this proceeding. He joined Jersey Central at about the same time as Cameron Drew, and he has known and worked with Drew at various times over the years. He was assigned to the QA staff at Oyster Creek at the time of the so-called flange incident in November 1978, although he was not then the QA site supervisor there.

As to the flange incident, he recalls that although Drew may have been correct that the valve supplier was not on the QA "approved list" at the time the valve was ordered, Drew was wrong in the conclusions he drew from that fact. First, he testified, the QA program did allow acceptance of a product from a vendor not on the "approved list" provided a specific prior evaluation of the vendor was performed prior to delivery of the product. Such an evaluation had been conducted in the case of the valve supplied in the 1978 outage. Secondly, the vendor in question had in fact been placed on the "approved list" by the time the 1978 November flange incident occurred. There is no claim made by the Company, or Fuller, however, that these justifications were made known to Drew at the time of the incident.

Mr. Fuller is the person who, at the time of the flange incident, advised Drew how to file an NCR report. He testified that it is Company policy to inform employees that they have authority and ability to fill out and document non-conformance of quality or safety standards they feel may be a problem. The filing

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of NCR's is not discouraged in any way by the Company. In fact, NCR's are filed with some frequency: the Oyster Creek plant alone averages anywhere from 500 to 1000 such filings a year, according to Mr. Fuller.

When Drew raised his question about the quality of the welded flange he took Fuller to see that valve. Fuller testified:

Q. Mr. Drew took you over to see the valve?

A. Yes. He did. The valve had been taken from the store room to the -- or near the job location, a pre-fab shop and the crate hadn't been opened until it was delivered to the pre-fab shop. Mr. Drew showed me the weld that was in question. I looked at it. I agreed with him that cosmetically it did not look, quote "very good" unquote. The identification of whether or not Mr. Drew should file a non-conformance form came after that. The conversation regarding what he should do and how he should fill out the form came after that. I told him that once he described the nonconformance, it would have to come back to me. I would review it against the requirements and, at that point, we would have to either validate the



non-conformance as being a true violation of the established requirements or we would have to invalidate it.

As to the NRC's Performance Appraisal Board's (PAB) audit in October 1979, Mr. Fuller testified that while this kind of audit was a comparatively new NRC procedure, it was in essence a routine matter, that is, one not triggered by any special problem. The PAB audit disclosed that Drew's NCR had not been formally closed out. Jersey Central's QA staff apparently did not "close out" the NCR because it lacked the original copy of the form. Drew had retained the original copy, as Fuller learned after the PAB audit. Lacking the original, the QA staff had marked a file copy of that NCR as invalid and considered the matter closed. For all practical purposes the matter had been closed, but as a technical matter the formal closure was not effective because the original copy of the NCR was not on file. The NRC auditors did not "cite" Jersey Central for any infraction as a result of that technical non-closure of the NCR, but it did carry the matter as an item on its agenda of discussion with Jersey Central officials. The NCR staff did specifically question Dres, Skorka, and Popow about this matter in early October 1979.

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About two months later, after the PAB audit, and after several conversations between Fuller and Drew, the original was returned by Drew to Fuller and the matter of this NCR was finally and formally marked "closed. "

Fuller did testify, however, that rather ironically, Jersey Central was "cited" by NRC's October 1979 PAB audit team for a related infraction of the regulations as a result of the flange incident in November 1978. When Cameron Drew was told by the Company to go ahead and fix the weld he objected to, he simply went ahead and had the welding performed as he believed it should have been done. There was technical procedural problem, however, with this approach since Drew neglected to obtain a specific prior approval of his welding procedure, in accordance with governing quality assurance rules. The welding procedure he did use was found to be "qualified," after the fact, following the PAB audit, but it still was a technical violation of the QA rules. No fine or other sanction was levied against the Company by the NRC as a result of this infraction.

Mr. Fuller also presented for the record a series of fifteen Jersey Central NCR's attributable directly to Cameron Drew, or to persons working under the supervision of Drew. One of these fifteen NCR'S, initiated on September 26, 1979, simply reflects the PAB discovery that Drew had gone forward, as just discussed above, with welding that flange without obtaining a formal QA approval of the welding procedure.

Two other NCRs relate to certain incidents in May 1977 when Drew apparently authorized purchase orders of a certain type of welding wire without review by the QA Department. These reports show that on June 1, 1977, Drew agreed to secure QA's review of such purchase orders in the future. These two NCRs seem to reflect a routine

communications problem between two departments with no special significance for this case.

The other twelve NCRs concerned incidents taking place in October and November 1978 in the latter stages of the 1978 Oyster Creek "outage" in which the flange incident occurred. Fuller's testimony, however, indicates that NCR reports were commonplace at this time at Oyster Creek, and I see no value in further analysis of them. It is not at all clear that any or all of these particular incidents were specifically related to the disciplining of Drew.

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6. *Argument for Summary Dismissal.* Respondent's argument that the complain should be dismissed as a matter of law, within the meaning of subsection (g) of the statutory protection in issue (42 U.S.C 5851 (g)) is without merit. There is no substantial evidence that Complainant deliberately caused any violation of any requirement of the law. Drew did proceed to repair the defective valve in November 1978 without benefit of a prior written approval of his welding procedure for that weld, but he believed he was acting properly. He also believed he was acting properly when he kept possession of the original copy of his NCR report. Also, the various NCR's charged to Drew's performance by Fuller's testimony do not reflect deliberate causing of violations.

7. *Discussion and Conclusion.* Examined in a light most favorable to Complainant this proceeding involves the kind of situation now generally categorized as a "dual motive" case, that is, one in which the decision to discharge an employee may have involved two motivating factors: one a legitimate business reason, and the other a reaction to employee activity protected by law. In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the National Labor Relations Board reviewed extensively its prior evidentiary tests for adjudicating dual motivation discharge cases, and adopted a new formulation:

. . . First, we shall require that the General Counsel make a *prima facie* showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision. Once that is established, the burden will shift to the employer to demonstrate that same action would have taken place even in the absence of the protected conduct. (251 NLRB at 1089).

As noted in *Consolidated Edison Company of New York, Inc. v. Donovan*, Docket No. 81-4215, decided March 8, 1982, F2 (2d Cir. 1981), the *Wright Line* test is an adaptation of the so-called "but for" test, stated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The rule is summarized by the Court in *Consolidated Edison* to be as follows:

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. . . The [Supreme] Court said that burden was properly placed upon the employee to show that his conduct was constitutionally protected, and that such conduct was a motivating factor in the Board's decision not to rehire him. Thereafter, the district court "should have gone on to determine whether the Board [of Education] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's [employee's] reemployment even in the absence of the protected conduct." This is known as the "but for" test. In other words the employee would not have been dismissed but for his engaging in protected activity.

The Second Circuit in *Consolidated Edison* took note of apparently conflicting rules in the Circuit Courts as to placement of the burden of ultimate persuasion in comparable dual motive discharge cases arising under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and concluded:

Our view is that we should adopt the rule enunciated in the *Mt. Healthy* case which places the burden on the employer to show by a preponderance of the evidence that it would have reached the same decision as to the employee's dismissal even in the absence of the protected conduct.

The Second Circuit in *Consolidated Edison* specifically adopted this "but for" test for application to proceedings under the statute in issue here, 42 U.S.C. § 5851.

On the surface, there are a number of factual elements tending to establish that Complainant here has made a *prima-facie* showing to support an inference that his protected conduct was a motivating factor in his suspension and discharge. First of all, Cameron Drew did engage in protected activity, particularly in November 1978 when he refused to "mind his own business," and did report to the NRC a situation he felt was a safety problem the Company would not correct. There is evidence that the NRC may have discovered and acted upon the defective valve independently of Drew's report. But that same evidence, NRC inspector Briggs' letter, Exhibit No. 8,

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shows that the Company's specific concern was that the NRC had been "informed" of the defect. Drew had been arguing with the QA Staff and Mr. Popow for a week about this valve, and it is Drew's uncontradicted, specific testimony that Popow had reacted angrily, saying that it was "none of my damn business and tear up that report." When the NRC reactor inspector reported the defective valve to the assistant superintendant of the Oyster Creek station, John Sullivan, Sullivan asked him "if I had been informed of the weld defect." Then, it was Drew that Sullivan promptly called and ordered "to fix the valve the way you want." I am persuaded that Drew did blow a whistle, and that the Company probably knew it and was concerned about it.

There is circumstantial evidence which could support a finding that Drew's later probation and subsequent discharge actually were motivated, in part at least, by his whistle-blowing activity. As late as September 14, 1978, only a matter of weeks before the Oyster Creek confrontation in early November, Drew had been given a formal written evaluation of "Commendable" for his prior year's performance in the Company. That evaluation had been signed by three superior Company officials: Skorka, his immediate supervisor (but who actually had a job position two levels above Drew's position in the organization); George Kelcek, who was then Skorka's supervisor; and I.F. Finfrock, a Company vice president.

From the "Commendable" rating in September, Drew was dropped to a marginal or unsatisfactory 3-rating the following August. Skorka actually assigned the 3-rating to Drew, but only after Popow had intervened in the matter. This was the first time Skorka had given one of his technical staff persons an unsatisfactory annual evaluation. The factual inquiry becomes whether this extraordinary down grading and disciplining of Drew in August 1979 was due in some measure, at least, to Company (in the person of Popow, particularly) concern about his "blowing the whistle" to the NRC in November 1978.

Taken by itself, the above-summarized factual picture, I believe, would establish a *prima-facie* case that Drew's protected conduct was a motivating factor in his August 1979 discipline.

But on a careful review of the record, I find sufficient evidence to contradict and overcome Drew's case in this respect. Cameron Drew for many months had been a stubborn headstrong employee whom the Company had ample grounds to discipline in August

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1979. While Skorka then regarded Drew as an adequately skilled technician, he had been frustrated by Drew's attitudes for some time. Judging by Skorka's demeanor and responses as a witness at the hearing, and placing his responses in context with other evidence of record including Drew's testimony, I do credit Skorka's account of his increasing difficulty and frustration dealing with Drew's personality as a subordinate employee. I believe that the marginal or unsatisfactory rating he gave Drew on August 22, 1979 represented his own personal opinion of Drew's overall performance as an employee.

Drew's own testimony shows a long history of clashes disagreements, communications problems, non-cooperation, etc., between himself and Popow. Drew did not get along either with Guy Cheruvenko, his immediate supervisor in the months just prior to August 1979, and I believe Skorka's testimony that Cheruvenko's criticism of Drew triggered the decision to do the "something-should-be-done" type of review of "Drew's performance.

It is most probable that, in August 1979, Popow well remembered his November 1978 disagreements with Drew, including Drew's "whistle-blowing" report on the valve incident. But Drew's own testimony makes it clear that there were many other matters to sustain anger and disagreement between these two men. Drew believed that Popow's being hired in March 1978 "was the beginning of the end of my career with JCP&L." Popow was hired at a position in the Company two or three supervisory levels above Drew, and yet Drew's own testimony shows Drew continuously confronted Popow directly on a broad range of management responsibilities, including "code requirements and interpretations, welding quality, QA involvement, and Engineering involvement," in Drew's words.

In the face of specific direct evidence of substantial, good reason for the Company to take a careful new look at Drew's performance in August 1979, and to begin a formal discipline or control process for his performance, I conclude that the circumstantial evidence tending to establish Drew's November 1978 whistle-blowing as a "motivating factor" does not stand above the level of mere speculation, and that it does not prevail to establish a *prima facie* case of motivation.

There was a second occasion, in October 1979, when Cameron Drew reported on Company activities to the NRC. But the evidence here does not show that entire occasion as essentially more than a

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routine kind of activity initiated by the NRC on its own. I do not find substantial evidence, even of a circumstantial nature, to show that the Company reacted in any way to Drew's participation in that audit.

When Drew was discharged in August 1980, much of the specific justification seems to have been based on Mr. Saha's experiences with Drew. He too had difficulty in controlling Drew, who, even though he was on probation during Saha's early months on the job, would unilaterally proceed to change or override Saha's instructions. I believe Saha's account of his role in Drew's discharge: that it was Saha's opinion that Drew would not reliably follow his supervision in the future. I do not find substantial evidence, anything beyond mere speculation, to support a finding that Drew's meeting with, or reports to, the NRC were or became a "motivating factor" in his being disciplined and discharged by the Company.

I conclude, therefore, that Complainant here has not made a *prima facie* showing sufficient to support an inference that his protected conduct was a motivating factor in the Company's decision to discipline or discharge him.

Bearing in mind, however, that the *Wright Line* and *Consolidated Edison* tests are comparatively new for use in factual situations of the type involved here, I have also analyzed and evaluated the evidence just as though Complainant's *prima facie* threshold

burden had been met. In so doing, I also find that the preponderance of the evidence is that Drew's superiors at Jersey Central would have proceeded to discipline him in August 1979 and terminate his employment in September 1980 even if he had not engaged in this protected activity.

Cameron Drew performed satisfactorily for the first two years of his employment at Jersey Central, but thereafter failed to perform to the satisfaction of the various supervisors, John Skorka in particular. Skorka continued to give Drew high annual performance ratings through 1978 to ensure annual pay increases he believed functioned as incentives to Drew, but he coupled those ratings with warnings and counseling to be more cooperative and to work within the limits of his own job assignments. Skorka had hired Drew, had served as Drew's immediate supervisor for most of his employment, and had believed that Drew was regarded as "his man" in the Company. Skorka, accordingly, was increasingly

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frustrated by his inability to control Drew. The essence of Skorka's criticism of Drew was that, from some point in 1976 on, he had a mistaken, unrealistically inflated estimate of his own position in the Company, and that this characteristic resulted both in repeated conflicts with supervisors and co-workers, and in inadequate performance by impeding several important projects to which Skorka assigned him between 1976 and 1979. These were the effort to qualify for an R-Stamp, the 7000-Series program, and the distribution of a welding manual to field station welders.

I believe that Skorka had lost patience with Drew by mid-1979, when Cheruvenko added his criticism to trigger a hard new look at Drew's performance, and that by this time Skorka was ready to give Drew a serious warning about his performance. Skorka's written evaluation on August 22 reflected his actual opinion, and this new low rating for Drew was in itself a *de facto* probation.

The record is silent as to Popow's state of mind in August 1979 when he acted with Skorka to place Drew on probation, but it is assumed for purposes of this analysis that in some measure his actions were motivated by Drew's whistle blowing report to the NRC. Such a motivation, however, is not *per se* either (a) impermissible as a matter of law or (b) conclusive evidence refuting the Company's claim to have acted legitimately in disciplining Drew. Drew's own testimony tends to establish that 1978 valve incident and Drew's report to the NRC are but parts of a substantial record of "unavoidable clashes" between himself and Popow. As noted by the Supreme Court in *Mr. Healthy*, the fact a dramatic and perhaps abrasive incident of protected activity "is inevitably on the minds of those responsible for the decision," does not require reinstatement of a discharged employee. The Court observed:

A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same

candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance records and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision. (429 U.S. 274, 86).

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During his probationary status Drew was assigned to a new supervisor who then encountered the recurrent problem of keeping Drew under control following instructions and supervision. Finally, Saha not only doubted the Drew would reliably follow his supervisor in the future, he also uncovered mistakes in Drew's prior work on welding procedures. Saha knew about the 1978 whistle blowing matter, but testified credibly that he approached his job with Drew with an open mind. His testimony concerning his dealings with Drew was specific and credible, and I believe that his recommendation in August 1980 to discharge Drew did reflect his own opinion as a responsible supervisor. With all of the above findings in mind, I conclude that, assuming *arguendo* that Drew's protected conduct was a motivating factor in his discipline, the preponderance of the evidence is that the Company would have treated him in the same manner even in the absence of the protected conduct.

In view of the foregoing, it is ORDERED that this Complaint be, and it is hereby, DISMISSED.

ROBERT M. GLENNON  
Administrative Law Judge

Dated: JUN 16, 1982

Boston Massachusetts NOTICE: Pursuant to 29 C.F.R. § 24.6(a) this recommended decision is being forwarded this date, along with the records, to the Secretary of Labor for a final order.

RMG:pm